APPENDIX.

Statement of the Case.

CROSBY, APPELLANT, *v.* RATH ET AL., APPELLEES.

Injunction—Labor unions—Picketing and boycotting enjoined—No legitimate trade dispute existed.

(No. 27639—Decided March 6, 1940.)

APPEAL from the Court of Appeals of Cuyahoga county.

The plaintiff is the operator of a restaurant in the city of Cleveland.

The defendants are officers and members of three voluntary, unincorporated associations known as labor unions.

In her second amended and supplemental petition the plaintiff asks an injunction to restrain the defendants from continuing certain acts of violence in furtherance of a conspiracy to injure her restaurant business and thereby compel her to discharge her employees unless they become members of one of the defendant unions.

With few exceptions the controlling facts in the case are not in serious dispute. The evidence in the record discloses that the plaintiff's present employees are not members of a union or represented thereby; that they do not desire such membership; that each employee is serving under a renewable, written, three-month contract; that in selecting her employees the plaintiff makes no inquiry as to such membership; that in a number of instances she has employed union members; that when asked by her employees for advice on this subject she tells them to follow their own preference; that she never has discharged an employee because of membership in a union; that there is no dispute between the plaintiff and her employees; that she has permitted a representative of the defendant unions to solicit her employees; that the defendants do not complain about the wages paid by the plaintiff to her employees; that the defendants do not accuse the plaintiff of underselling restaurants employing union members exclusively; that on October 4, 1937, the defendants began to

picket plaintiff's restaurant; that the number of persons engaged in picketing varied from 40 to 100; that these persons wore union badges and obstructed the entrance to the plaintiff's restaurant; that they called the plaintiff's employees vile and obscene names; that they threatened, assaulted, struck and injured some of the plaintiff's employees, one of whom suffered a fractured jaw; that plaintiff's restaurant was stenchbombed on two occasions; that a dynamite bomb was exploded at the place of the plaintiff's former residence; that an attempt was made to bomb the plaintiff's present residence; that the home of one of the plaintiff's employees was stenchbombed; that the homes of some of the plaintiff's customers were stenchbombed; that some of the plaintiff's customers who drove to her restaurant found the tires of their automobiles cut and punctured while there; that anyone attempting to deliver supplies to plaintiff's restaurant was insulted and threatened; that one delivery truck driven by a union driver was seized and partially burned; and that during the period of picketing the plaintiff's business was reduced to approximately one-third of its former volume. The defendants disclaim responsibility for the above-enumerated acts of violence and insist that the contracts existing between the plaintiff and her employees are invalid.

The Court of Common Pleas rendered a decree in favor of the plaintiff. The employment contracts were held valid, and the court found that no legitimate trade dispute was involved. The defendants were enjoined from picketing or boycotting the plaintiff's restaurant and from interfering with the operation of the plaintiff's business.

Upon appeal to the Court of Appeals on questions of law and fact the decree of the court was the same as that of the Court of Common Pleas except that picketing and boycotting were permitted.

The case is in this court for review upon the allowance of a motion to certify the record.

Messrs. Galvin & Babin and *Messrs. Stanley & Smoyer*, for appellant.

Mr. Martin E. Blum and *Mr. Leonard J. Stern*, for appellees.

BY THE COURT. The question as to the validity of the three-month, written, renewable employment contracts here involved requires no discussion. Both the Court of Common Pleas and the Court of Appeals held them valid, and a study of the record discloses nothing tending to support the contention of the defendants to the contrary.

The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute. However, this difficulty is simplified by the fact that both the plaintiff and the defendants rely upon the decision of this court in the case of *La France Electrical Const. & Supply Co.* v. *International Brotherhood of Electrical Workers*, 108 Ohio St., 61, 140 N. E., 899, subsequently cited with approval in the case of *State, ex rel. United District Heating, Inc.*, v. *State Office Building Commission*, 125 Ohio St., 301, 181 N. E., 129. In the *La France case* this court gave careful consideration to the principles of law relating to the subject of trade disputes, and affirmed the decision of the lower courts permitting the picketing of the employer's plant. But in the opinion it is clearly pointed out that "Upon the record with regard to this point there can be little doubt that a legitimate trade dispute existed in this case, in which former employees of the plaintiff company were seeking to secure the right to work with the company under terms of employment different from those which their employer was at the time requiring. That being the case, the methods open to use in a legitimate trade dispute were open to strikers here." Of course, as already indicated in the factual statement, it is not even contended that in the instant case there is any dispute whatsoever between the plaintiff and her employees, as in the *La France case, supra*. On the contrary, the only dispute in the instant case is between the plaintiff and the defendants with whom the plaintiff's employees have no connection. The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. That this must be the law is clearly indicated by the intolerable and unexplain-

able predicament in which an employer might well find himself if picketed by two or more hostile unions with each one insisting that the employer discharge his employees unless they become members of that particular union alone.

Finally it should be noted that the instant situation is concededly unaffected by statute. This clearly distinguishes the case from most of the authorities relied upon by the defendants.

Two recent decisions restating the generally accepted rule are to be found in the cases of *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers' Union*, 371 Ill., 377, 21 N. E. (2d), 308, and *Roth* v. *Local Union*, — Ind., —, 24 N. E. (2d), 280. In the former case one paragraph of the syllabus reads in part as follows:

"The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities in interference with another's business * * *."

The decree of the Court of Appeals must be reversed to the extent that it permits picketing and boycotting. Final judgment is hereby rendered in conformity with the decree of the Court of Common Pleas.

Judgment reversed in part.

Weygandt, C. J., Williams, Matthias and Hart, JJ., concur.

Myers, J., concurs in the judgment only.

Day and Zimmerman, JJ., dissent.

Myers, J., concurring. Since the case is in equity, the pleas of both plaintiff and defendants are addressed to the trial court as a chancellor. All elements of the case are to be considered. The conduct of the parties will be carefully scrutinized to determine whether they are entitled to relief or protection of the court. From a consideration of the entire record, the trial court was justified in its finding that there was a proximate connection between the acts of de-

fendants and the violence charged. In respect to the plaintiff's place of business, the defendants have therefore forfeited whatever rights they might otherwise have had peaceably to picket under the law. Rights peaceably exercised will be protected by the courts but such protection is forfeited when the attempted exercise thereof is accompanied by acts of violence as in the instant case.

For the reasons stated I concur in the judgment only.

DAY, J., dissenting. I dissent from the view of the majority of this court.

The Court of Common Pleas granted an injunction, restraining all picketing, bannering and boycotting of plaintiff's restaurant. On hearing *de novo*, the Court of Appeals permitted picketing and bannering, which judgment is here for review. The record discloses that picketing was not accompanied by violence following the judgment of that court. It is the judgment of the Court of Appeals which is here for review, and that judgment did not permit picketing accompanied by violence.

Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech.

The judgment of the Court of Appeals should be affirmed.

ZIMMERMAN, J., dissenting. From a reading of the majority opinion, this case would appear to be wholly one-sided. However, such is not the fact and the writer believes the position of the defendants, supported by ample and respectable authority, is entitled to expression.

Having had a strict injunction issued against them in the Court of Common Pleas forbidding any "picketing," the defendants appealed the cause on questions of law and fact to the Court of Appeals.

The higher court heard the controversy *de novo*, but substantially on the record as made in the court of first instance. The matter was presented to Judges Hamilton, Ross and Matthews of the First Appellate District, sitting by designation in the Eighth Appellate District.

By unanimous action the court found that Mrs. Pearl E. Crosby operates a restaurant in the city of Cleveland, and does not employ union labor; that her employees are under contract for specified terms of employment and do not desire to become unionized, and that the defendant unions have the right to notify the public that Mrs. Crosby does not employ union labor.

Apparently following the principles enunciated in the case of *S. A. Clark Lunch Co.* v. *Cleveland Waiters & Beverage Dispensers Local*, 22 Ohio App., 265, 154 N. E., 362, it was "ordered, decreed and adjudged," subject to the limitations of laws or ordinances as to the use of streets and sidewalks, that the defendant unions might maintain two moving representatives near the front of the restaurant and one at the rear entrance for the sole purpose of informing the public orally, or by handbills and signs, that Mrs. Crosby does not employ union help, and to request that the restaurant be not patronized for that reason; such activities to be conducted in a quiet, orderly fashion, and so as not to interfere with any person desiring to enter or leave the restaurant for any purpose.

The defendants, and those having notice of the order, were enjoined from molesting, interfering with, or annoying Mrs. Crosby and her employees in any manner.

Was such decree reasonable, proper and lawful? A majority of this court holds in effect it was not, adopting the attitude that "peaceful picketing" is only authorized when a *bona fide* trade or labor dispute exists directly between an employer and his employees, as concerns wages, hours, working conditions, etc. Supporting this conclusion, reliance is placed on the case of *La France Electrical Construction & Supply Co.* v. *International Brotherhood of Electrical Workers*, 108 Ohio St., 61, 140 N. E., 899.

With due deference for the opinion of his associates, the writer of this dissent submits that the general view taken by the majority is too narrow, and that the *La France case*, upon its facts, is not authority for the proposition that "peaceful picketing" may be resorted to only in the event of a strike.

Acts of violence perpetrated against Mrs. Crosby, her employees and customers are mentioned in the majority

opinion. It is to be borne in mind that these occurred prior to the issuance of the injunction by the Court of Common Pleas, that the defendants disclaim responsibility therefor, and that there is a lack of evidence implicating them.

Be that as it may, such conduct, by whomsoever carried on, cannot be defended, condoned or sanctioned.

Responsible labor leaders realize that the pursuit of illegal methods to bring about what may be a desirable result is harmful to the labor movement as a whole, and arouses public opinion against the cause of organized labor.

However, we are not here concerned with the past. Our primary function is to determine whether the order of the Court of Appeals for the future should remain undisturbed. *J. H. & S. Theatres, Inc.*, v. *Fay*, 260 N. Y., 315, 320, 183 N. E., 509, 511. Or, as it was put in *Fenske Bros., Inc.*, v. *Upholsterers International Union*, 358 Ill., 239, 260, 193 N. E., 112, 121, 97 A. L. R., 1318, 1333: "The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion."

No one will seriously deny that organized labor has done as much if not more than any other single agency to improve the lot of working people as a class. Increased wages, shorter hours, better working conditions and a higher standard of living can be ascribed in an important degree to its activities and influence. The struggle has been long and arduous, and the continued existence of labor organizations as effective bodies is dependent upon progress.

While, of course, no employer can be compelled to hire union workmen, and no workman can be forced to join a labor union, organized labor should have the privilege, in a reasonable, peaceable and orderly way, of advising the public, if it so desires and for what it may be worth, of the truth concerning an employer of labor, especially where the practices followed and the policies pursued by such employer are opposed to the interests of union labor, and are considered deleterious to employees generally, or to employees engaged in a particular kind of work. The defendants strongly urge that such is the situation as con-

cerns the Crosby restaurant, and testimony in the record is pointed out as supporting the contention.

Irrespective of special legislation on the subject of which there is none in Ohio, the term "trade dispute," or "labor dispute," according to the liberal judicial concept, has a broader and more comprehensive meaning than the one given it by the majority of this court.

Such concept is exemplified in the leading case of *Exchange Bakery & Restaurant, Inc.*, v. *Rifkin*, 245 N. Y., 260, 263, 157 N. E., 130, 132, where the court said:

"The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

Again, in *Blumauer* v. *Portland Moving Picture Machine Operators' Protective Union*, 141 Ore., 399, 403, 17 P. (2d), 1115, 1116, it was remarked:

"Organized labor has the right to present its side of a controversy to the public by all lawful means if such means may be, and are, used in a lawful manner without violence, or threats, or intimidation of the employer, his employees, or the patrons of the employer's business. * * *

"This right of presenting its side of a controversy, organized labor may exercise by lawful means, in a lawful manner when its members have reasonable grounds to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there may be no direct controversy between the employer and his immediate employees."

In the later case of *Geo. B. Wallace Co.* v. *International Association of Mechanics*, 155 Ore., 652, 664, 63 P. (2d), 1090, 1095, the same court observed:

"Without any attempt to reconcile all that has been said on the subject, we think the better reasoned cases are to the effect that a strike and picketing are not necessarily concomitant. There may be a strike without picketing and picketing without a strike. Each is a combative weapon which labor may use to accomplish its objectives if the same be lawful."

And in *Music Hall Theatre* v. *Moving Picture Machine Operators*, 249 Ky., 639, 642, 61 S. W. (2d), 283, 285, this language appears:

"The law recognizes the right of peaceful picketing. Although that term is sometimes criticised as a contradictory one, since the word 'picketing' is taken from the nomenclature of warfare and is strongly suggestive of a hostile attitude, it has acquired a significance and meaning commonly understood. It connotes peaceable methods of presenting a cause to the public in the vicinity of the employer's premises. Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause, and to use persuasive inducements to bring its own policies to triumph."

A number of courts, in the absence of enactments like the Norris-LaGuardia Act (29 U. S. Code, Section 101 *et seq.*), and where no controversy has existed between an employer and his immediate employees, have held "peaceful picketing" lawful, when its avowed design and purpose

is to benefit organized labor directly or indirectly. Some of the representative cases are: *United Chain Theatres, Inc.,* v. *Phila. Moving Picture Machine Operators Union* (D. C., Pa.), 50 F. (2d), 189; *Steffes* v. *Motion Picture Machine Operators Union,* 136 Minn., 200, 161 N. W., 524; *Empire Theater Co.* v. *Cloke,* 53 Mont., 183, 163 P., 107, L. R. A. 1917E, 383; *Bomes* v. *Providence Local No. 223 of Motion Picture Operators,* 51 R. I., 499, 155 A., 581; *Nann* v. *Raimist,* 255 N. Y., 307, 314, 174 N. E., 690, 73 A. L. R., 669, 674. Compare *People* v. *Harris,* 104 Colo., 386, 91 P. (2d), 989, 122 A. L. R., 1034; *Scofes* v. *Helmar,* 205 Ind., 596, 187 N. E., 662; *Kirmse* v. *Adler,* 311 Pa., 78, 166 A., 566.

In *American Furniture Co.* v. *I. B. of T. C. & H. of A. Chauffeurs, etc., Local, Teamsters & Helpers General Local,* 222 Wis., 338, 359, 268 N. W., 250, 260, 106 A. L. R., 335, 348, the court confidently stated that the proponents of the *Norris-LaGuardia Act* intended to enact into law the views expressed in *Exchange Bakery & Restaurant* v. *Rifkin, supra* (245 N. Y., 260, 263, 157 N. E., 130, 132).

Under language as used in such act (29 U. S. Code, Section 113 [a] and [c]), it has been expressly held that a "labor dispute," permitting "peaceful picketing" adjacent to an employer's establishment, may exist, even though none of the employees are union members, and there is no altercation between the employer and his employees. *Senn* v. *Tile Layers Protective Union,* 222 Wis., 383, 268 N. W., 270, affirmed 301 U. S., 468, 81 L. Ed., 1229, 57 S. Ct., 857; *Lauf* v. *E. G. Skinner & Co.,* 303 U. S., 323, 82 L. Ed., 872, 58 S. Ct., 578; *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S., 552, 82 L. Ed., 1012, 58 S. Ct., 703; *L. L. Coryell & Son* v. *Petroleum Workers Union* (D. C., Minn.), 19 F. Supp., 749.

The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of "peaceful picketing," reasonably exercised on a defensible basis, would constitute an infringement of the constitutional guaranty of free speech. *Senn* v. *Tile Layers Protective Union, supra* (301 U. S., 468, 478, 81 L. Ed. 1229, 1236, 57 S. Ct., 857); *People* v. *Harris, supra* (104

Colo., 386, 394, 91 P. [2d], 989, 993). Compare, *Schneider* v. *State of New Jersey* (*Town of Irvington*), *etc.*, 307 U. S., . . . , 84 L. Ed., . . . , 60 S. Ct., 146.

While Mrs. Crosby declares she is not antagonistic toward union labor and has no objection to her employees becoming union members, the record contains instances tending to belie such statements. Particular reference is made to the reaction initially displayed to the suggestion of unionization and the tactics subsequently adopted; to the treatment of a union waitress working for a time at the Crosby restaurant, and to the development when a union organizer attempted to approach the restaurant cooks, who had evinced a friendliness to his overtures.

Furthermore, the representations of the defendants and the conclusion of the Court of Appeals as to the object of the "peaceful picketing" cannot be ignored. If it were clear that the dominant motive was to ruin Mrs. Crosby's business from a purely evil incentive rather than to promote the interests of union labor, a different attitude would be in order, for "when the purpose of picketing is to injure or destroy a business rather than to further the common interests of the worker, it is an unlawful interference with the property rights of the employer and should be enjoined." *Geo. B. Wallace & Co.* v. *International Association of Mechanics, supra* (155 Ore., 652, 664, 63 P. [2d], 1090, 1095).

Therefore it is finally submitted that the judgment of the Court of Appeals is justifiable and should be affirmed.